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BRIEF IN OPPOSITION

Leonard Cotton, Marquette Hall, Lamont Thomas, Matilda Hall, Jovan Powell, Jesus Hall and Stanley Hall, Jr., (hereinafter referred to as "Respondents"), submit their Brief in Opposition to the Petition for Writ of Certiorari filed by the United States of America, (hereinafter referred to as "Petitioner"), to review the judgment of the United States Court of Appeals for the Fourth Circuit. For the reasons set forth, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

For the purposes of this Brief in Opposition, the Respondents adopt and incorporate by reference the relevant facts set forth in the reported opinion rendered by the United States Court of Appeals for the Fourth Circuit, decided August 10, 2001, in *United States of America v. Leonard Cotton, et al.*, 261 F.3d 397 (4th Cir. 2001). The decision is reprinted in Appendix A to the Petition for Writ of Certiorari. Pet. App. A at 1a-35a.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petitioner states explicitly that it wishes this Court to examine "[t]he recurring questions of how to treat indictment errors…." Pet. at 22. What the Petitioner does not state - but implicitly wishes - is that this Court determine the future viability and, for that matter, integrity of the grand jury indictment process. By doing so, the Petitioner challenges the Fifth Amendment's safeguard that a defendant be tried and sentenced for only those crimes as returned by an indictment. The Petitioner desires that this Court use this narrow *Apprendi* indictment error case, which is incapable of frequent re-occurrence, as the vehicle to now re-explore how courts should treat indictment errors generally. Unfortunately for the Petitioner, the instant case is not the case for such a sweeping examination of how legally defective indictments should be examined on appellate review.

There are three compelling reasons why this Court should deny the Petition.

I.

DESPITE THE CONFLICT OF THE COURTS OF APPEALS, THE DECISION BELOW REPRESENTS BUT A RELATIVELY SMALL NUMBER OF FEDERAL CRIMINAL CASES AFFECTED BY *APPRENDI V. NEW JERSEY* AND WILL NOT FREQUENTLY RE-OCCUR IN FUTURE FEDERAL CRIMINAL CASES AND ITS UNIQUENESS SHOULD PRECLUDE REVIEW BY THIS COURT.

It cannot be reasonably disputed that the decision below deals with a relatively limited universe of federal criminal cases that were pending in the district court or were on direct appellate review when the Court issued the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In recognition of the *Appendi* decision, the Petitioner necessarily makes certain concessions: (1) that post-*Apprendi*, the courts of appeals have uniformly held that drug quantities must be charged in the indictment and proven to a jury beyond a reasonable doubt to support an enhancement above the otherwise statutory maximum sentence; and (2) that the Petitioner now accepts the logic of *Apprendi*, the statutory scheme set forth in 21 U.S.C. §841 and that "*Apprendi* requires drug quantity to be charged in a federal indictment to support an increase in the statutory maximum sentence." Pet. at 10.

Since the decision of the Fourth Circuit properly applied *Apprendi* and the Petitioner readily concedes that federal prosecutors now know how to charge 21 U.S.C. §841 offenses and obtain indictments from the grand jury in federal courts, there is no call for review by this Court. It is unlikely that the type of factual circumstances presented in this case will regularly re-occur in federal courts. As such, this case does not rise to such a level to warrant this Court's consideration.

II.

IN ITS QUESTION PRESENTED, THE PETITIONER RELIES ON THE MISSTATEMENT OF FACT THAT THE RESPONDENTS DID NOT OBJECT TO THE SENTENCES IN THE DISTRICT COURT AND THAT THE RESPONDENTS HAD NOTICE THAT THE GOVERNMENT COULD SEEK ENHANCED SENTENCES BASED ON DRUG QUANTITY.

In formulating its question presented, the Petitioner relies incorrectly on two faulty factual assertions.

The first is that the Respondents did not object to the sentences in the district court. Pet. at 11. The amount of drug quantity attributable to each of the Respondents was indeed a contested issue at the sentencing hearings in the district court. In a chronological sense, perhaps, the Petitioner may be correct since each of the Respondents were sentenced pre-*Apprendi*. It does not, however, matter, since *Apprendi* was decided while this case

was pending on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1997).

Closely related to the first misstatement of fact is the second that the "defendants did not contest the evidence while on notice of the need to do so." Pet. at 8. This is not correct. Even Chief Judge Wilkinson, in dissent, acknowledged that "[v]arious defendants disputed the amount of crack that should be attributed to them based on their role in the conspiracy." Pet. App. A at 28a.

Contrary to the Petitioner's assertions, this instant case is not a case where any of the Respondents agreed to drug quantity and/or waived the drug quantity issue, or for that matter, had notice that the government could seek an enhanced sentence.

III.

THE FOURTH CIRCUIT WAS CORRECT IN FINDING THAT THE *APPRENDI* INDICTMENT ERROR STEMMED FROM A DEFECT IN THE INDICTMENT AND THAT SUCH AN ERROR "SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS" SINCE THE RESPONDENTS WERE SENTENCED FOR A CRIME THAT THEY WERE NEITHER CHARGED NOR CONVICTED IN VIOLATION OF THE FIFTH AMENDMENT.

Even though the Petitioner appears to have made certain concessions adhering to *Apprendi*, to wit, that drug quantity must be charged in the indictment by the grand jury and proven by the government beyond a reasonable doubt

to the petit jury, it still persists to resist this Court's direction that drug quantity is an "element" of an §841 offense and not merely "a fact that was not alleged in the indictment." Pet. at 7. It is transparent that the Petitioner's true motivation in asking this Court to review this case is not so much the Fourth Circuit's opinion or this Court's decision in *Apprendi*. What the Petitioner seeks to do is to mount an attack on the role that the grand jury plays in returning indictments in criminal proceedings and, therefore, is a direct assault on the Fifth Amendment itself.

The Petitioner wants this Court to consider treating indictment errors involving -- *the grand jury* -- under the plain-error analysis articulated in *United States v. Olano*, 507 U.S. 725 (1993). In support of this proposition, the Petitioner refers this Court to those cases that have discussed how appellate courts should review trial errors involving -- *the petit jury* - under plain error review. See *e.g.*, *Neder v. United States*, 527 U.S. 1 (1999)(faulty jury instruction); *Johnson v. United States*, 520 U.S. 461 (1997)(failure to submit an element of a crime to the petit jury).

The Petitioner fails to give the necessary adherence to those cases by this Court that have discussed how appellate court should review grand jury errors -- the error in this case. The reason that the Petitioner's silence is so deafening is that the Fourth Circuit provided a careful consideration of the relevant facts and the applicable law in resolving those cases where there is a grand jury error as opposed to an error which occurs during the trial process. The Fourth Circuit followed this Court's instruction that "[a]n indictment found by the grand jury is indispensable to the power of the court to try [the defendant] for the crime with which he as charged." *Ex Parte Bain*, 121 U.S. 1, 12-13 (1887). And that a "court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

"[T]he Fifth Amendment to the United States Constitution requires that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.'" Pet. App. A at 9a. The Petitioner wants this Court to sanction the ability of federal district and circuit courts to "impermissibly broaden the indictment on its own accord during the sentencing phase." Pet. App. A at 10a. And, by

judicial fiat, abrogate "the prerogative of the grand jury, because only the grand jury has the power to broaden the charges 'after an indictment has been returned.'" Pet. App. A at 11a.

The essence of the Respondents' opposition to the Petition can be summarized as follows:

> We cannot imagine that the Supreme Court would believe itself bound to notice the error when a conviction is based upon a crime with which a defendant was not charged on one hand [*United States v. Silber*, 370 U.S. 717 (1962)], but, on the other hand, decline to recognize the error under the equally (or possibly more) egregious circumstance where a defendant is sentenced based upon a crime that was not charged in the indictment nor even presented to the petit jury.

Pet. App. A at 13a.

The Fourth Circuit held that the Respondents were sentenced for an unindicted crime under *Apprendi*. This is not subject to debate or dispute (and, in fact, is now conceded by the Petitioner) since an indictment that does not include the specified threshold drug quantities necessary for conviction under the aggravating drug trafficking offenses set forth in 21 U.S.C.A. §841 is defective. As a result of this error of constitutional dimension, five of the Respondents received life imprisonment sentences and two Respondents received thirty-year imprisonment sentences - when the statutory maximum

for each of the Respondents was a term of imprisonment not to exceed twenty years. This type of error - attributable solely to the grand jury - is of the type that will "defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

The Fourth Circuit was legally correct in concluding that that *Apprendi* indictment error was one that "stems from a defect in the indictment." Pet. App. A at 15a. Certainly a defective indictment which calls into question a court's jurisdiction to impose a sentence not charged in the indictment is equally as (if not more) troublesome as those limited types of cases where this Court has "found structural errors" to have occurred. *Johnson*, 520 U.S. at 468. As the error here resulted in the Respondents being sentenced as opposed to convicted for a crime for which they were not charged, the appropriate remedy is resentencing within the appropriate contours of the count of conviction. *United States v. Pridgeon*, 153 U.S. 48, 62 (1894). That is, a sentence not to exceed a term of imprisonment of twenty years.

The Fourth Circuit was also legally correct in its interpretation the *Apprendi* indictment error under the plain error analysis. *Olano*, 507 U.S. at 731-32. By finding that a sentence which exceeds the applicable

statutory maximum of twenty years does affect a defendant's substantial rights, there is plain error. It was an entirely appropriate exercise of the court's discretion to conclude that such a sentence "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Pet. App. A at 12a.

Under either theoretical approach - structural error or plain error review, the Respondents were sentenced "for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury. Pet. App. A at 11a.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Timothy J. Sullivan
Counsel of Record
7305 Baltimore Avenue, Suite 301
College Park, MD 20740
(301) 927-3035
Attorney for Respondent, Lamont Thomas

Thomas J. Saunders
10 N. Calvert Street, Suite 715
Baltimore, MD 21202
(410) 547-9087
Attorney for Respondent, Leonard Cotton

Arthur S. Cheslock
514 St. Paul Street
Baltimore, MD 21202
(410) 962-8580
Attorney for Respondent, Marquette Hall

David R. Solomon
207 E. Redwood Street
Baltimore, MD 21202
(410) 539-7307
Attorney for Respondent, Matilda Hall

William H. Klumpp
1404 Cresthill Court
Fallston, MD 21047
(410) 893-5353
Attorney for Respondent, Jovan Powell

John David Ash
4367 Hollins Ferry Road, Suite 2-C
Baltimore, MD 21227
(410) 246-5600
Attorney for Respondent, Jesus Hall

Stanley H. Needleman
1005 N. Calvert Street
Baltimore, MD 21202
(410) 385-2020
Attorney for Respondent, Stanley Hall, Jr.

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